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No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO MOTION OF BASIN ELECTRIC FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION AND PROPOSED MEMORANDUM

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INTRODUCTION

On November 12, 1991, Basin Electric Power Cooperative ("Basin") moved for leave to file a memorandum brief in opposition to Nebraska's motion to amend its petition. Basin's motion for leave should be denied for two reasons. First, pursuant to Supreme Court Rule 37.1, Basin's proposed memorandum would not bring any relevant matter to the attention of the Court that has not been raised by a party to the proceedings. More importantly, pursuant to the rationale underlying Rule 37.1, Basin's motion should be denied not only because the memorandum would not be helpful to the Court, but on the contrary would serve only to mislead the Court through its flowery mischaracterization of the provisions of the existing Decree and Nebraska's amended petition.

ARGUMENT

Point I

Basin's Proposed Memorandum Would Bring No New Relevant Matters to the Attention of the Court

Rule 37.1 of the Rules of the Supreme Court states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Aside from Basin's fundamental mischaracterization of the purpose of the existing Decree and Nebraska's amended petition, every point made by Basin in opposition to Nebraska's motion to amend is identical to a point made by Wyoming and/or Colorado.[1] Basin argues that the pending motion to amend is the same as that filed by Nebraska in 1988. Basin's Memorandum at 3-4. Wyoming and Colorado make the same, unfounded assertions in their briefs. Wyoming Brief at 12, 27-28; Colorado Brief at 2-4, 12-15. Basin argues that the Court should utilize the standard for deciding the issues on the merits in determining whether to grant the motion for leave to file the amended petition. Basin's Memorandum at 4-5. Wyoming makes the same argument. Wyoming Brief at 14-16. While Wyoming does not go quite so far, Basin argues that there is *no* unapportioned natural flow water above Tri-State Dam.[2] Basin's Memorandum at 6-7; Wyoming Brief at 16-19. Basin, Wyoming, and Colorado argue that the injury is speculative, ignoring the over-appropriated condition of the river. Basin's Memorandum at 7-17; Wyoming Brief at 16-26; Colorado Brief at 8-12. Finally, Basin reiterates Wyoming's and Colorado's arguments that resolution of the pending issues is a prerequisite to the consideration of the issues raised by the amended petition, albeit without indicating why.[3] Basin's Memorandum at 17-20; Wyoming Brief at 19-24; Colorado Brief at 16.

In sum, the matters that Basin would bring to the Court's attention would simply burden the staff and facilities of the Court. Accordingly, Basin's motion for leave to file its memorandum should be denied because it would bring no relevant matter to the Court that is not already there. The proposed memorandum is needlessly repetitive.

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[1]The basic thesis of Basin's memorandum is that Nebraska is seeking an alteration of the existing apportionment. Excitedly, Basin argues that:

> [Nebraska] contends that, since the entry to the decree, she has actually received more water than is apportioned to her; that she has found uses for such water from which 'equities' have sprung up; and that these equities should now be accommodated by altering the current apportionment.

Basin's Proposed Memorandum at 8. Nebraska does not contend that it has received more water than it was apportioned, beyond the operational waste that Special Master Doherty and the Court recognized would necessarily pass Tri-State Dam. We have not found overlooked uses from which equities have sprung up. And we most definitely are not seeking an accommodation which would "[alter] the current apportionment."

Basin's diatribe is designed to alarm the Court — to rouse the Court to viligence over a landscape of windmills.

[2]Wyoming asserts that Nebraska's attempt to have the presently unapportioned, non-irrigation season flows apportioned is disingenuous. According to Wyoming, "[t]here is an existing Decree and an existing apportionment that was intended to describe all of Nebraska's rights to demand natural flow of the North Platte River." Wyoming Brief at 18. As the Court has noted and Wyoming tacitly admits, the 1945 Decree apportions irrigation water only. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945). In this regard, Basin's ridiculously radical interpretation of the Decree will be discussed in Point II, *infra*.

[3]Granting Nebraska's motion for leave to file its amended petition would in no way interrupt the resolution of issues raised by the pending cross-motions for summary judgment. The Special Master's recommendations and the Court's ultimate decision would only provide guidance for the apportionment of the non-irrigation season flows, which would happen in due course in any event.

Point II

Not Only Would Basin's Proposed Memorandum Not be Helpful to the Court, it Would Misdirect the Court's Attention

Basin's most egregious assertion is that Nebraska's motion for leave to apportion the non-irrigation season flows is without merit because there is no unapportioned natural flow:

> The major premise of Nebraska's instant motion for leave to amend her petition, that the existing decree does not apportion all of the natural flow of the river originating above Tri-State, is patently fallacious. The decree ... leaves none of the natural flow unapportioned during either the irrigation season or non-irrigation season.

Basin's Memorandum at 6. The only support for Basin's assertion is an allusion to the Court's statement in 1945 that "all water in the stream except storage water" was apportioned. *Nebraska v. Wyoming*, 325 U.S. 589, 670 (1945). With a curious indifference to gravity, Basin argues that "[a]n imperative of the very structure of the decree is that all natural flow water originating above Tri-State that is apportioned neither to Colorado nor to Nebraska is apportioned to Wyoming."[4] Basin's Memorandum at 7. Basin concludes its argument by imagining that Nebraska's true motive — lurking "behind a phantasm of the existence of 'unapportioned' water" — is to obtain an alteration of the existing apportionment.

We respectfully submit that Basin needs a rest. Precisely what is and what is not apportioned by the Decree is set out paragraph by paragraph in Nebraska's amended petition. *Ibid.* at 2-5. Neither Basin, Wyoming, nor Colorado has attempted to dispute the provisions of the Decree or their

[4]Contradicting itself, Basin first asserts that "none of the natural flow [is] unapportioned," and then that the natural flow that is unapportioned must belong to Wyoming. *Id.*, at 6 and 7.

factual underpinnings. Paragraph V of the Decree, which apportions the natural flow, is limited to "[t]he natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year...." 325 U.S. at 667. During the non-irrigation season, *i.e.*, October 1 to April 30, the *unapportioned* inchannel inflows to Nebraska from Wyoming averaged 197,400 acre feet annually, 1946-1987. In prefacing the Court's opinion in 1945, Justice Douglas was not irresponsibly argumentative when he stated that "[t]he controversy pertains to the use for irrigation purposes of the water of the North Platte River...." 325 U.S. at 591. Nor did his tongue slip when he concluded that damage had been clearly proven principally because the "natural flow of the river *during the irrigation season* [had] long been over-appropriated." *Id.* at 608 (emphasis added). In sum, the "phantasm" that ostensibly animates Nebraska's amended petition is the case as it was presented, decided, and decreed in 1945.

CONCLUSION

It is clear that the only relevant matters that Basin would like to bring to the Court's attention in its proposed memorandum have already been brought to the Court's attention by Wyoming, Colorado, or both. The other matter that Basin wishes to discuss is clearly irrelevant because it grossly mischaracterizes the existing Decree and Nebraska's amended petition. Accordingly, pursuant to Supreme Court Rule 37.1, Basin's motion for leave to file its proposed memorandum should be denied.

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that true and correct copies of the foregoing Nebraska's Memorandum in Opposition to Motion of Basin Electric for Leave to File Memorandum in Opposition to Nebraska's Motion for Leave to File Amended Petition and Proposed Memorandum were served this 25th day of November, 1991, on each of the following parties:

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